

ATTORNEY FOR PETITIONER:  
**TIMOTHY J. VRANA**  
ATTORNEY AT LAW  
Columbus, IN

ATTORNEYS FOR RESPONDENT:  
**STEVE CARTER**  
ATTORNEY GENERAL OF INDIANA  
**ALLEN R. MORFORD**  
DEPUTY ATTORNEY GENERAL  
Indianapolis, IN

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**IN THE  
INDIANA TAX COURT**

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KOOSHTARD PROPERTIES, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 49T10-0408-TA-35
	)	
HOWARD COUNTY ASSESSOR,	)	
	)	
Respondent.	)	

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ORDER ON RESPONDENT'S MOTION TO DISMISS

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**NOT FOR PUBLICATION**  
**June 30, 2005**

FISHER, J.

Kooshtard Properties, LLC (Kooshtard) appeals the final determination of the Indiana Board of Tax Review (Indiana Board) valuing its commercial land for the March 1, 2002 assessment date. The matter is currently before the Court on the Howard County Assessor's (Assessor) motion to dismiss.

**FACTS AND PROCEDURAL HISTORY**

Kooshtard owns .91 acres of land at the intersection of U.S. 31 and S.R. 26 in Kokomo, Indiana. A gas station/convenience mart sits on the land.

In accordance with Indiana Code § 6-1.1-4-13.6, a land order was promulgated for use by Howard County assessing officials for the 2002 general reassessment. Pursuant to that land order, the base rate of Kooshtard's land could vary between \$70,000 and \$150,000 per acre. (See Cert. Admin. R. at 3, 6.)

For the March 1, 2002 assessment date, the Howard County Property Tax Board of Appeals (PTABOA) assigned Kooshtard's land an assessed value of \$219,100. In arriving at that value, the PTABOA used a base rate of \$150,000 per acre, and then applied a 50% positive influence factor.<sup>1</sup> The PTABOA determined that the application of the influence factor to Kooshtard's property was necessary to bring Kooshtard's land value in line with that of three other gas stations at the same intersection. (See Cert. Admin. R. at 9.)

Kooshtard subsequently filed a Petition for Review of Assessment (Form 131) with the Indiana Board on January 28, 2004. In its Form 131, Kooshtard asserted that the influence factor applied to its land should be removed. More specifically, Kooshtard argued that pursuant to the land order, the maximum value of its land - whether or not an influence factor was applied - could not exceed \$150,000 per acre.<sup>2</sup>

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<sup>1</sup> The property record card indicates that Kooshtard's base rate was \$150,000, its adjusted rate was \$160,500, its extended value was \$146,060 ( $\$160,500 \times .91$  acres), and, after the application of the 50% positive influence factor, its assessed value was \$219,100 ( $\$146,060 + (\$146,060/2)$ ). (Cert. Admin. R. at 42.) The Court is unsure as to how the property's adjusted rate was calculated but, because Kooshtard has not challenged that calculation, it is a non-issue.

<sup>2</sup> Accordingly, Kooshtard alleged that the proper value for its land was \$147,000. (Cert. Admin. R. at 3.) Kooshtard arrived at this value by multiplying the property's adjusted rate of \$160,500 by .91 acres.

The Indiana Board held a hearing on Kooshtard's appeal on February 13, 2004. On July 12, 2004, the Indiana Board issued its final determination in which it denied Kooshtard's request for relief.

Kooshtard filed an original tax appeal on August 12, 2004. In both its complaint and its written brief subsequently filed with the Court, Kooshtard argued that its influence factor should be removed because the land order's explanation regarding the application of influence factors lacked ascertainable standards. In other words, Kooshtard asserted that because the land order did not provide assessing officials with specific, detailed criteria for applying influence factors, the Indiana Board erred in upholding the application of an influence factor to Kooshtard's land in order to "bring[] [it] into conformance with the other corner properties[.]" (Pet'r Br. at 5.) (See *also* Pet'r Compl. at ¶ 8.) On March 24, 2005, the Assessor filed a motion to dismiss Kooshtard's appeal for lack of subject matter jurisdiction, alleging that because Kooshtard did not present its "ascertainable standards" argument at the administrative level, the Court is precluded from determining the issue on appeal.

The Court heard the parties' oral arguments on May 20, 2005. Additional facts will be supplied as necessary.

## **DISCUSSION AND ANALYSIS**

### **I. The Assessor's Motion To Dismiss**

In its motion to dismiss, the Assessor argues that Kooshtard raises and argues an entirely different issue on appeal than it did during the administrative hearing process. Consequently, the Assessor argues that because the Indiana Board never made a final determination with respect to Kooshtard's ascertainable standards issue,

Kooshtard has failed to exhaust its administrative remedies with respect to that issue. (See Resp't Mot. to Dismiss at ¶¶ 2-7.) "A party's failure to exhaust its administrative remedies creates a jurisdictional defect and makes a [Trial Rule] 12(B)(1) motion to dismiss for lack of subject matter jurisdiction appropriate." (Resp't Mot. to Dismiss at ¶ 8 (citing *Common Council of the City of Hammond v. Matonovich*, 691 N.E.2d 1326, 1328 (Ind. Ct. App. 1998)).) The Court disagrees.

The Indiana legislature has created an administrative procedure for the review and appeal of property tax assessments. See IND. CODE ANN. § 6-1.1-15-1 to -15 (West 2005 & Supp. 2004-2005.) If a taxpayer believes his assessment is erroneous, he must file a petition with the county auditor, requesting a review of the assessment by the County Property Tax Assessment Board of Appeals (PTABOA). A.I.C. § 6-1.1-15-1. The PTABOA must then conduct a hearing. A.I.C. § 6-1.1-15-2.1. Should the PTABOA's decision prove unfavorable, the taxpayer may then appeal the decision to the Indiana Board, which also must conduct a hearing. A.I.C. § 6-1.1-15-3, -4. If the taxpayer is dissatisfied with the Indiana Board's decision, he may appeal to the Tax Court. A.I.C. § 6-1.1-15-5(b).

In turn, this Court's subject matter jurisdiction<sup>3</sup> is governed by Indiana Code § 33-

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<sup>3</sup> "Every action has three jurisdictional elements: (1) jurisdiction of the subject matter; (2) jurisdiction of the person; and (3) jurisdiction of the particular case." *Carroll County Rural Elec. Membership Corp. v. Indiana Dep't of State Revenue*, 733 N.E.2d 44, 47 (Ind. Tax Ct. 2000) (citation omitted). "Subject matter jurisdiction is the power of a court to hear and determine the general class of cases to which the proceedings before it belong." *Musgrave v. State Bd. of Tax Comm'rs*, 658 N.E.2d 135, 138 (Ind. Tax Ct. 1995) (citation omitted). Whether subject matter jurisdiction exists "depends on whether the type of claim advanced by the petitioner falls within the general scope of authority conferred upon the court by constitution or statute." *Id.* (citation omitted).

26-3-1. That statute provides that the Tax Court has “exclusive jurisdiction over any case that arises under the tax laws of Indiana and that is an initial appeal of a final determination” of the Indiana Board. IND. CODE ANN. § 33-26-3-1 (West 2005). The Court construes its jurisdictional grant of power under Indiana Code § 33-26-3-1 broadly. *See Harlan Sprague Dawley, Inc. v. Indiana Dep’t of State Revenue*, 583 N.E.2d 214, 216-219 (Ind. Tax Ct. 1991).

Here, Kooshtard believed its assessment was erroneous and it pursued the proper administrative path prior to filing its appeal with this Court. In turn, Kooshtard’s appeal with this Court challenges the assessment of Indiana’s property tax *and* it appeals from a final determination of the Indiana Board. Thus, this Court finds that it has subject matter jurisdiction over Kooshtard’s appeal. The Assessor’s motion to dismiss for lack of subject matter jurisdiction is therefore DENIED.

## **II. Waiver**

Nevertheless, this Court is not an administrative court; rather, it is a court of record with hybrid trial court and appellate court characteristics. *See* IND. CODE ANN. § 33-26-1-2 (West 2005); A.I.C. § 33-26-3-1; IND. CODE ANN. § 33-26-3-2, -3 (West 2005). When this Court reviews final determinations of the Indiana Board, it acts as a true appellate court. Consequently, the Court may reverse a final determination of the Indiana Board only if it is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or

limitations;

(4) without observance of procedure required by law; or

(5) unsupported by substantial or reliable evidence.

IND. CODE ANN. § 33-26-6-6(e)(1)-(5) (West 2005). In making this determination, the Court is bound by the evidence and issues raised at the administrative level. See IND. CODE ANN. § 33-26-6-3(b) (West 2005); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1022 (Ind. Tax Ct.1999) (citing *State Bd. of Tax Comm'rs v. Gatling Gun Club, Inc.*, 420 N.E.2d 1324, 1328 (Ind. Ct. App.1981)). "Therefore, where a taxpayer fails to raise an issue at the administrative level, the issue is waived and may not be considered by the Court." *Hoogenboom-Nofziger*, 715 N.E.2d at 1022.

At the administrative hearing before the Indiana Board, Kooshtard merely argued that, whether or not an influence factor was applied, its land's value could not exceed \$150,000 per acre. On appeal, Kooshtard has attempted to present a new issue: under the current land order, an influence factor cannot be applied because the land order is vague and does not provide the standards necessary for applying an influence factor in the first place. The Court finds these to be two very different issues.<sup>4</sup> Consequently, because Kooshtard failed to raise the latter issue at the hearing before the Indiana Board, it is precluded from raising that challenge now.

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<sup>4</sup> This conclusion is substantiated by the fact that Kooshtard felt it necessary to present additional evidence *after* it filed its appeal with the Court. Indeed, while making its presentation to the Indiana Board, Kooshtard's main piece of evidence was a single-page *excerpt* from the land order indicating that land in its neighborhood could be valued with a base rate between \$70,000 and \$150,000 per acre; but as support for its claim before this Court, Kooshtard attached to its written brief the *entire* land order, which included notes and instructions on applying influence factors in general. (*Cf.* Cert. Admin. R. at 43 *with* Pet'r Br. at Ex. A, p.v.)

Kooshtard volleys with the assertion that the affirmative defense of waiver is itself waived if not contained within a pleading. (Pet'r Resp. to Resp't Mot. to Dismiss (hereinafter Pet'r Resp.) at 1-2.) Thus, Kooshtard explains,

[a]ffirmative defenses to Complaints filed in [the] Tax Court must be pleaded in the Answer. If an affirmative defense is not raised in the Answer, it is waived. Here, if the Assessor had wanted to plead the affirmative defense of waiver, she was required to do so in her Answer. The Assessor failed to do so. She has therefore waived the affirmative defense of waiver.

(Pet'r Resp. at 2 (internal citation omitted).) The Court disagrees.

In *Bunch v. State*, 778 N.E.2d 1285, 1287 (Ind. 2002), the Indiana Supreme Court not only recognized that the term “waiver” has been applied to several different concepts, but distinguished waiver as an affirmative defense under Trial Rule 8(C) from waiver as doctrine of judicial administration that forecloses an issue on appeal. More specifically:

[w]e think the latter is more properly described as “procedural default” or “forfeiture,” but we acknowledge that it is often referred to as “waiver.” Indiana Trial Rule 8(C) requires parties to plead some affirmative defenses, including “waiver,” or forfeit them. It also places the burden of proof at trial on the party required to plead the matter as an affirmative defense. In contrast to the “waiver” governed by Rule 8(C), there is also a doctrine of judicial administration whereby appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue.

*Id.* (internal footnote and citations omitted). This case deals with the forfeiture variety of waiver.

Kooshtard did not raise its ascertainable standards issue during the administrative hearing process. Consequently, and despite the fact that the Assessor

did not plead the affirmative defense of waiver in its Answer, this Court - acting in its capacity as a true appellate court - finds sua sponte that Kooshtard's ascertainable standards issue has been forfeited.

### **CONCLUSION**

The Assessor's motion to dismiss for lack of subject matter jurisdiction is DENIED. Nevertheless, the Court must AFFIRM the Indiana Board's final determination, as the sole issue presented by Kooshtard in its original tax appeal is one that the Court is precluded from determining. The parties shall bear their own costs.

SO ORDERED THIS 30th day of June, 2005.

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Thomas G. Fisher, Judge  
Indiana Tax Court

#### Distribution:

Timothy J. Vrana  
Timothy J. Vrana, LLC  
636 3<sup>rd</sup> Street  
P.O. Box 527  
Columbus, Indiana 47202-0527

Steve Carter  
Attorney General of Indiana  
By: Allen R. Morford, Deputy Attorney General  
Indiana Government Center South, Fifth Floor  
302 West Washington Street  
Indianapolis, IN 46204